

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 267, As Amended in the Senate

BY REVENUE AND TAXATION COMMITTEE

AN ACT

RELATING TO THE HAZARDOUS SUBSTANCE EMERGENCY RESPONSE ACT; AMENDING SECTION 39-7102, IDAHO CODE, TO REVISE LEGISLATIVE FINDINGS AND PURPOSES; AMENDING SECTION 39-7103, IDAHO CODE, TO REVISE DEFINITIONS AND TO DEFINE TERMS; AMENDING SECTION 39-7104, IDAHO CODE, TO REVISE PROVISIONS RELATING TO THE MILITARY DIVISION'S POWERS AND DUTIES; AMENDING SECTION 39-7109, IDAHO CODE, TO REVISE PROVISIONS RELATING TO REIMBURSEMENT OF CERTAIN COSTS; AMENDING SECTION 39-7111, IDAHO CODE, TO REVISE PROVISIONS RELATING TO LIABILITY FOR THE RELEASE OF A HAZARDOUS SUBSTANCE AND TO MAKE A TECHNICAL CORRECTION; AND AMENDING SECTION 39-7112, IDAHO CODE, TO REVISE PROVISIONS RELATING TO RECOVERABLE COSTS AND CIVIL REMEDIES.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 39-7102, Idaho Code, be, and the same is hereby amended to read as follows:

39-7102. LEGISLATIVE FINDINGS AND PURPOSES. (1) The legislature of the state of Idaho finds:

(a) That the state has a duty to protect the health, safety and welfare of the people of Idaho;

(b) That the protection and preservation of Idaho's environment promotes the health, safety and welfare of her people;

(c) That the unexpected and uncontrolled releases or threat of releases of hazardous substances constitute a threat to the people and environment of Idaho; and

(d) That knowledgeable persons, governmental entities and organizations should be encouraged to lend expert assistance in the event of a hazardous substance incident.

(2) Therefore, it is hereby declared that the purposes of the provisions of this chapter are:

(a) To facilitate emergency response planning and coordination at a state and local level;

(b) To provide for the prompt response and containment of releases or threats of release of hazardous or potentially hazardous substances to include explosives and weapons of mass destruction;

(c) To provide liability for emergency response costs associated with responding to hazardous substances incidents;

(d) To encourage knowledgeable persons, governmental entities and organizations to lend assistance by providing them with limited immunity from civil liability; and

(e) To provide a mechanism for recovery of costs incurred by the state and local governments in responding to emergency hazardous substance incidents to be used in lieu of, and not in addition to, cost recovery mechanisms or claims for relief provided by

applicable federal laws. By enacting this chapter, it is the intent of the legislature that the state and local governments elect to proceed in state courts under the provisions of this chapter and other provisions of state law rather than in federal court under federal laws, where necessary to recover emergency response costs. There is no provision for cost recovery for a hazardous substance incident response occurring on private property where the owner responds to the incident with the approval of the incident commander.

SECTION 2. That Section 39-7103, Idaho Code, be, and the same is hereby amended to read as follows:

39-7103. DEFINITIONS. As used in this chapter:

(1) "Bureau" means the bureau of homeland security within the military division.

(2) "Emergency" means ~~an abrupt~~ release or threat of release which in the reasonable judgment of the local emergency response authority in consultation with the bureau, threatens immediate ~~and irreparable~~ harm to the environment or the health and safety of any individual and which requires immediate action for the containment or control of a hazardous or potentially hazardous substance to prevent, minimize or mitigate harm to the public health, safety or the environment which may result if action is not taken.

(3) "Hazardous substance incident" means an emergency circumstance requiring a response by the state emergency response team or the local emergency response authority to monitor, assess and evaluate a release or threat of a release of a hazardous or potentially hazardous substance. A hazardous substance incident may require containment or confinement or both, but does not include site cleanup or remediation efforts after the incident commander has determined the emergency has ended.

(4) "Hazardous substance" means:

(a) Any "hazardous substance" within the scope of section 101(14) of the federal comprehensive environmental response, compensation and liability act (CERCLA), 42 U.S.C. 9601(14);

(b) Any hazardous ~~material~~ substance within the scope of section 104 of the federal hazardous materials transportation act, 49 U.S.C. 1803, and the federal department of transportation regulations promulgated pursuant thereto; ~~and~~

(c) Any extremely hazardous substance within the scope of section 302 of the federal emergency planning and community right-to-know act, 42 U.S.C. 11002; and

(d) Any explosive or weapon of mass destruction utilized or threatened to be utilized in an act of terrorism, crime or other threat to public safety.

(5) "Incident commander" is the person in charge of all responders to a hazardous substance incident and who is identified in the Idaho hazardous materials emergency incident command and response plan or the private emergency response plan.

(6) "Local emergency response authority" means those persons designated under section 39-7105, Idaho Code, by the city, county, or the military division to be first responders to hazardous substance incidents.

(7) "Military division" means the military division of the office of the governor.

(8) "Person" means any individual, public or private corporation, partnership, joint venture, association, firm, trust, estate, the United States or any department, institution, or agency thereof, the state or any department, institution, or agency thereof, any municipal corporation, county, city, or other political subdivision of the state, or any other legal entity whatsoever which is recognized by law as the subject of rights and duties.

(9) "Potentially hazardous substance" means any substance which in the reasonable judgment of the local emergency response authority in consultation with the bureau is likely a hazardous substance.

(10) "Private emergency response plan" means a plan designed to respond to emergency releases of hazardous or potentially hazardous substances at a specific facility or under a specific set of conditions.

(101) "Release" means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, escaping, dumping or disposing of a hazardous or potentially hazardous substance, or the threat of the same, into the environment. "Release" does not include any discharge of a hazardous substance into the environment which is authorized by limits and conditions in a federal or state permit relating to the protection of public health or the environment so long as the permitted activity from which the release occurs is in compliance with applicable limits and conditions of the permit.

(1+2) "State emergency response team" means one (1) of the state emergency response teams authorized by the military division to respond to hazardous substance incidents.

(13) "Threat of release" means the release of a hazardous or potentially hazardous substance is likely.

SECTION 3. That Section 39-7104, Idaho Code, be, and the same is hereby amended to read as follows:

39-7104. MILITARY DIVISION – POWERS AND DUTIES. (1) The military division through the bureau of homeland security shall implement the provisions of this chapter and direct the activities of its staff and, in so doing, the military division may:

(a) Through the bureau, in accordance with the laws of the state, hire, fix the compensation, and prescribe the powers and duties of such other individuals, including consultants, emergency teams and committees, as may be necessary to carry out the provisions of this chapter.

(b) Create and implement state emergency response teams that have appropriately trained personnel and necessary equipment to respond to hazardous substance incidents. The military division shall enter into a written agreement with each entity or person providing equipment or services to a designated emergency response team. The teams shall be available and may respond to hazardous substance incidents at the direction of the military division or its designee or local incident commander.

(c) Contract with persons to meet state emergency response needs for the teams and response authorities.

(d) Advise, consult and cooperate with agencies of the state and federal government, other states and their state agencies, cities, counties, tribal governments and other persons concerned with emergency response and matters relating to and arising out of hazardous substance incidents.

(e) Encourage, participate in, or conduct studies, investigations, training, research, and demonstrations for and with state emergency response teams, local emergency response authorities and other interested persons.

(f) Collect and disseminate information relating to emergency response to hazardous substance incidents.

(g) Accept and administer loans, grants, or other funds or gifts, conditional or otherwise, made to the state for emergency response activities provided for in this chapter.

(h) Submit an annual report prior to February 1 to the governor and to the legislature concerning emergency response to hazardous substance incidents.

(i) Prepare, coordinate, implement and update a statewide hazardous materials incident command and response plan that coordinates state and local emergency response authorities to respond to hazardous substance incidents within the state for approval by the legislature. The plan shall address radiation, explosive and weapons of mass destruction incidents. The Idaho hazardous materials incident command and response plan shall be consistent with and a part of the Idaho state disaster plan provided in section 46-1006, Idaho Code, after legislative approval.

(2) The military division shall have the powers and duties of a state emergency response commission under the federal emergency planning and community right-to-know act, 42 U.S.C. section 11001 et seq.

(3) The military division may promulgate rules and procedures to govern reimbursement of claims pursuant to this chapter.

(4) All state agencies and institutions will cooperate and provide staff assistance to the military division in carrying out its duties under this chapter.

SECTION 4. That Section 39-7109, Idaho Code, be, and the same is hereby amended to read as follows:

39-7109. RIGHT TO CLAIM REIMBURSEMENT. (1) State emergency response teams and local emergency response authorities may submit claims to the military division for reimbursement of the following documented costs incurred as a result of their response to ~~and containment of~~ a hazardous substance incident:

(a) Disposable materials and supplies acquired, consumed and expended specifically for the purpose of the response;

(b) Compensation of employees for the time and efforts devoted specifically to the response that are not otherwise provided for in the applicant's operating budget, (e.g., overtime pay for permanent full-time and other than full-time employees, recalled personnel or responding when out of jurisdiction);

(c) Rental or leasing of equipment used specifically for the response (e.g., protective equipment or clothing, scientific and technical equipment);

(d) Replacement costs for equipment owned by the applicant that is contaminated beyond reuse or repair, if the applicant can demonstrate that the equipment was a total loss and that the loss occurred as a result of the response (e.g., self-contained breathing apparatus irretrievably contaminated during the response);

(e) Decontamination of equipment contaminated during the response;

(f) Special technical services specifically required for the response (e.g., costs associated with the time and efforts of local and state personnel to recover the costs of response and of technical experts/specialists not otherwise provided for by the local government);

(g) Medical monitoring or treatment of response personnel;

(h) Laboratory costs for purposes of analyzing samples taken during the response; and

(i) Disposal costs. Such costs may be reimbursed as provided in this chapter.

Reimbursement for the costs identified in paragraphs (a) through (c) of this subsection will not exceed the duration of the response.

(2) A private person, who is not a part of the state emergency response team or a local emergency response authority and is not liable under section 39-7111, Idaho Code, may submit

1 a claim to the military division for costs identified in section 39-7109, Idaho Code, if their  
2 response was requested by the incident commander.

3 (3) Claims for reimbursement shall be submitted to the military division within sixty  
4 (60) days after termination of the hazardous substance incident for the state's determination of  
5 payment, if any.

6 (4) Reimbursements shall only be paid after the military division finds that the actions  
7 by the state emergency response team or the local emergency response authority were taken in  
8 response to a hazardous substance incident as defined in this chapter.

9 (5) The state of Idaho shall be subrogated to the rights of any such person so reimbursed  
10 to the extent of such reimbursement.

11 SECTION 5. That Section 39-7111, Idaho Code, be, and the same is hereby amended to  
12 read as follows:

13 39-7111. LIABILITY FOR RELEASE OF A HAZARDOUS SUBSTANCE. (1) Any  
14 person who owns, controls, transports, or causes the release or threat of release of a ~~hazardous~~  
15 substance which is involved in a hazardous substance incident shall be strictly liable for the  
16 costs arising out of a hazardous substance incident, identified in section 39-7112, Idaho Code.  
17 There shall be no liability under this chapter for a person otherwise liable who can establish by  
18 a preponderance of the evidence that:

19 (a) The hazardous substance incident was caused solely by:

20 (i) An act of God;

21 (ii) An act of war;

22 (iii) An act or omission of a third party, other than an employee or agent of the  
23 potentially liable person if:

24 1. The potentially liable person exercised reasonable care with respect  
25 to the ~~hazardous~~ substance involved, taking into consideration the  
26 characteristics of the ~~hazardous~~ substance in light of all relevant facts and  
27 circumstances; and

28 2. The potentially liable person took precautions against foreseeable acts  
29 or omissions of any such third party and the consequences that could  
30 foreseeably result from such acts or omissions; or

31 (iv) Application of a pesticide product or fertilizer registered under the federal  
32 insecticide, fungicide, and rodenticide act, 7 U.S.C. section 136, et seq., according  
33 to label requirements; or

34 (b) The substance was not a hazardous substance and the person otherwise liable acted  
35 reasonably under the circumstances.

36 SECTION 6. That Section 39-7112, Idaho Code, be, and the same is hereby amended to  
37 read as follows:

38 39-7112. COST RECOVERY AND CIVIL REMEDIES. (1) The military division shall  
39 be responsible for recovering those costs incurred by the state arising out of a hazardous  
40 substance incident identified in section 39-7109, Idaho Code, and legal other costs including  
41 processing the documented costs submitted by response agencies, attorney's fees, investigation  
42 costs, prelitigation and litigation costs.

1 (2) In deciding whether to commence a cost recovery action, and against whom a cost  
2 recovery action will be filed, the military division in exercising its prosecutorial discretion will  
3 take into consideration the cause of the incident, the total amount of cost incurred in responding  
4 to the incident, the avoidability of the incident and such other factors as the military division  
5 deems appropriate.

6 (3) The remedy for the recovery of those emergency response costs identified in section  
7 39-7109, Idaho Code, provided by this chapter shall be exclusive and shall not be used in  
8 conjunction with or in addition to any other remedy for recovery of such costs provided  
9 by applicable federal laws. Any person who receives compensation for the emergency  
10 response costs pursuant to any other federal or state law shall be precluded from recovering  
11 compensation for such costs pursuant to this chapter. Nothing in this chapter shall otherwise  
12 affect or modify in any way the obligations or liability of any person under any other provision  
13 of state or federal law, including common law, for damages, injury or loss resulting from the  
14 release of any hazardous substance or potentially hazardous substance or for remedial action  
15 or the cost of remedial action for such release.

16 (4) It shall be the duty of the attorney general to commence any civil action brought by  
17 the military division pursuant to this chapter. At the request of a political subdivision of the  
18 state or a local governmental entity who has responded to or contained a hazardous substance  
19 incident, the attorney general may commence a civil action on their behalf pursuant to this  
20 chapter.

21 (5) Any person who renders assistance at the request of the incident commander or his  
22 authorized designee in response to a hazardous substance incident may file a civil action under  
23 the provisions of this chapter for recoverable costs which have not been reimbursed by the  
24 state.

25 (6) There is hereby created in the state treasury the hazardous substance emergency  
26 response fund. Recoveries by the state for reimbursed costs shall be deposited in said fund to  
27 offset amounts paid as reimbursement.